STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2008
v	No. 276690 Wayne Circuit Court
RAYMOND CRAIG JONES, Defendant-Appellant.	LC No. 06-005379-01

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under the age of 13). Defendant was sentenced to 45 months to 20 years in prison. We reverse and remand for a new trial.

We first address defendant's argument that he was denied the effective assistance of counsel when his trial counsel elicited highly prejudicial evidence of his propensity for child sexual molestation. Defendant did not request a new trial on this ground or an evidentiary hearing so our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

Generally, counsel is presumed effective and the defendant must show that: (1) counsel's performance fell below an objectively reasonable standard, and (2) that defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Further, the defendant must demonstrate that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to demonstrate that an attorney's performance was substandard, a defendant must also overcome a strong presumption that the attorney's trial strategy was sound, even if the strategy is ultimately unsuccessful. *Id*. at 715.

Defendant's trial counsel elicited highly prejudicial evidence of defendant's propensity toward child molestation during cross-examination of a prosecution witness, complainant's mother, Iesha Leggette-Lee. Although the prosecution had made no attempt to bring out

propensity character evidence against defendant, defendant's trial counsel asked complainant's mother on cross-examination:

> *Q*. Had you ever heard—Now, you said you were very close to Raymond [defendant], your families were close. You never heard of Raymond doing anything like this to any other child, is that fair to say?
>
> *A*. That's not fair to say. I have heard that he's done this to another child.
>
> *Q*. Okay. And did you tell the police that, ma'am?
>
> *A*. Yes
>
> *Q*. So, you're saying that you told that to Officer Burton?
>
> *A*. Yes.
>
> *Q*. Okay. All right. What did you say, Ma'am?
>
> *A*. I told him what I was told. My grandfather told me that Raymond was accused of molesting his little cousin, Kala. And that's what I told Detective Burton.

Defendant's trial counsel again raised defendant's prior alleged molestation on cross-examination of the officer in charge of the investigation, Detective Burton:

> *Q*. . . . Now, you sat here and heard Ms. Lee's testimony, correct?
>
> *A*. Yes.
>
> *Q*. Earlier this morning. And you heard her state, did you not, that Raymond allegedly did something improper with a girl named Kala? Do you recall hearing that?
>
> *A*. I did hear her say that.
>
> *Q*. And did you also hear Mrs. Lee say that she told you that fact?
>
> *A*. I did hear her say that.
>
> *Q*. Do you have any documentation in any of your records of Mrs. Lee saying that?
>
> *A*. No, I don't.

Trial counsel also questioned defendant's grandmother, during direct examination, regarding the prior alleged molestation:

Q. Okay. Now, there has been some testimony . . . that your grandson engaged in inappropriate behavior with another member of your family. I believe her name was Kala. Will you tell the jury who Kala is?

A. Kala is my granddaughter. She's the daughter of my middle daughter.

* * *

Q. . . . Now, what can you tell the jury about that incident?

A. We were in Florida in a timeshare. And Ray was sleeping on the couch, a pull-out couch in the living room, you know, with the TV. And Kala came and got on the couch, the pull-out couch looking at TV with Ray. When her father came home, he was upset with her for being on the couch.

Q. But nothing untoward happened or anything like that?

A. No.

The prosecutor then objected on the basis that the witness lacked personal knowledge. A colloquy established that the witness was not in the living room at the time and the court directed the jury to disregard the last question. Defense counsel continued:

Q. Did anyone very [sic] tell you that anything untoward or illegal or immoral happened between Kala and Raymond?

A. No.

On cross-examination, the prosecutor asked:

Q. Now, you indicated you have a granddaughter named Kala, is that right?

A. Yes.

Q. And you were aware of an incident involving Kala and Raymond Jones, is that right?

A. I was aware of an allegation that she subsequently recanted.

Q. And you shared that information with Iesha Lee [the complainant's mother], isn't that right?

A. No. I did not.

Q. You shared that information with other members of your family?

A. The ones that were there at the condo.

Q. And you all shared information that you didn't believe Kala, isn't that right?

A. Well, it was, it came out before we even came back to Michigan that she wasn't telling the truth. She said so herself. Her parents were satisfied with it.

Finally, the prosecutor questioned defendant about the allegation:

Q. And you also heard testimony about someone named Kala, is that right?

A. Yeah.

Q. That your attorney was questioning you about,[1] is that right?

A. Yeah.

Q. This was also a family member of yours, is that right?

A. Once again –

Q. (Interposing) Again, a prior allegation against you, correct?

A. Yeah. Which never came to court, never was to the police because nothing actually happened and Kala came out and told everybody that that was a big lie anyway.

Q. So, she was lying, too, is that what you're saying?

A. If you want to, call her. I have nothing to sit here and lie about.

In closing argument, the prosecutor stated:

What's also interesting to note, however, is this testimony regarding Kala. Again, it's something that the defendant brought up, the defense brought up as a result of questioning Ms. Lee.

And when Ms. Lee said that, when Ms. Lee talked about the allegation that was made about Kala, the defense implied that somehow she was fabricating that. When Detective Burton was on the stand, he tried to question him about the fact that Ms. Lee didn't mention anything to him about it. Somehow implying that she just made that up on the stand because it was never mentioned to him. It wasn't important enough to mention to him.

Well, we know the allegation was made. Even his witnesses confirmed that. The allegation was made, absolutely. There was a Kala. But the reaction was, or the outcome was nobody believed her. I think the grandmother said, well, she recanted. Nobody believed her. Even Ms. Lee was quick to say, I don't want to

[1] We are unable to locate any questioning of defendant by defense counsel on this subject.

> believe her. And I think that's a natural human reaction to something like this, especially when you have someone you trust and you look up, a family who's bonded with this person. That's your initial reaction. And I think at that that's how all of these people felt initially. They all had that sense.

Given the nature of the charges against defendant, first degree criminal sexual conduct, we can think of no reasonable trial strategy that would include trial counsel's eliciting that defendant had been accused of molesting another child, whether or not the allegation was recanted. We recognize that having elicited the testimony regarding the allegation from complainant's mother, counsel then tried to limit the damage by having defendant's grandmother explain. Nevertheless, this testimony would have been inadmissible had the prosecution sought to present it, and counsel himself injected it into the trial. We conclude that counsel's performance in opening this door and eliciting the information fell below an objectively reasonable standard.

Upon a review of the entire trial, we conclude that absent trial counsel's having elicited this damaging testimony, there is a reasonable probability that the outcome may have been different. The testimony was clearly prejudicial. The jury was informed that another child with whom defendant was close had made an allegation that defendant had molested her, although, according to defendant's grandmother, the allegation was recanted to the satisfaction of the family. The prosecutor used this information to imply that this case involved a second instance where defendant molested a youngster with whom he was close, denied it, and his family discredited the allegation.

Complainant testified that the sexual assault happened on a single occasion in his basement, after defendant picked him up at kindergarten, driving complainant's mother's car. Complainant testified that the incident ended when complainant's mother rang the doorbell and came home, and that when he and defendant came upstairs he was going to tell his mother, but defendant held his hand over his mouth, in front of complainant's mother. Complainant also testified that right after the incident, he went next door to defendant's house to play with defendant's sister and he told her about what defendant did to him. Defendant's sister testified at trial and denied complainant told her any such thing. Complainant delayed reporting the incident to his family until December 2005, and continued to have a close relationship with defendant in the interim. Defendant, his mother, and his sister testified that defendant did not drive alone to pick up complainant before defendant obtained his driver's license in late October 2003. Defendant and his mother testified that defendant did not drive alone to pick up complainant thereafter, either, but at times accompanied complainant's mother to pick him up at school—defendant would go into the school to retrieve complainant while complainant's mother waited in the car. Defendant testified that several years before the trial, complainant told him that "some little boy over at his father's house was teaching him how to give oral sex." Defendant testified that he went to tell complainant's mother about it, but she was already on the phone talking about it. While sufficient, the evidence of defendant's guilt was not overwhelming. We conclude that there is a reasonable probability that, without counsel's having introduced the

incident with Kala into the trial, the outcome would have been different. *Mack*, *supra*, 265 Mich App at 129.[2]

Although we grant relief on the ineffective assistance of counsel issue, we briefly address defendant's argument that the trial court abused its discretion when it granted an amendment to the information during trial. A trial court's decision to grant a motion to amend the information is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008).

In this case, the information listed the date of the offense as "Year of 2003." Only complainant testified at the May 9, 2006 preliminary examination. He testified that he was eight years old, that the incident occurred three years earlier (than the preliminary examination, i.e., in 2003), that the incident occurred in March of 2003, and that he was in kindergarten at Burton School and five years old at the time. He also testified, however, that he started at Burton School in 2003, i.e., September 2003. The prosecution was apprised as of the preliminary examination that complainant was born in February 1998, and maintained that the incident occurred when he was in kindergarten. By simple math, the prosecution would have realized complainant was in kindergarten from September 2003 through June 2004, and that if the incident occurred in March, it must have been in 2004.

At trial, in January 2007, complainant testified that he was in the third grade, and that he was in kindergarten and five years old when defendant assaulted him. Complainant's mother testified that complainant told her that the incident happened in May of 2003. Complainant testified that the incident occurred in March of 2003, but later testified that his grandfather had died before the incident. Several witnesses testified that complainant's grandfather died in January 2004. Complainant later testified that he started kindergarten in September 2003, and that the incident occurred in March of 2004. On the third and final day of trial, after all prosecution witnesses had testified and two of the four defense witnesses had testified, the prosecutor moved to amend the information to include the first six months of 2004.

"A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *Unger*, *supra* at 221; *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987); MCL 767.76; MCR 6.112(H). Prejudice may be found where the defendant has inadequate notice of or an insufficient opportunity to defend against a charge. *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). A defendant may be able to demonstrate prejudice if he can show that he would have proceeded differently at trial if not for a late amendment. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

[2] Defendant also argues that counsel was ineffective in failing to object when a police officer improperly gave expert witness testimony, and in having to be coached repeatedly by the court on how to impeach a witness. We need not reach these assertions given our disposition of the case. We observe, however, that we would not grant a new trial based on these arguments.

Time is not of the essence, nor a material element, in a criminal sexual conduct case, thus the amendment did not charge a new crime. *Stricklin*, 162 Mich App at 633. Regarding notice, the prosecutor claims that defendant was fully aware of the variance in time, in particular because complainant testified at the preliminary examination regarding his (complainant's) age and year in school at the time of the incident (age 5 and in kindergarten). However, the prosecutor had all the information defendant had and still proceeded on the basis that the incident happened in 2003. Ordinarily, the difference in the calendar year would not have great significance. Here, however, a great deal of testimony focused on whether defendant had his driver's license when the incident was alleged to have occurred, and because defendant received his license in October 2003, the calendar year was important. There is no question that the trial would have proceeded differently had the amendment been made timely. Whether a different result would have obtained is, however, a question we need not reach.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Helene N. White